APPENDIX

COURT OF APPEALS, LUCAS COUNTY, OHIO

C. A. No. 3865
C. P. No. 155490
April 27, 1942

The Scott Realty Co.,

Appellee,

vs.

The Lasalle & Koch Co.,

Appellant.

APPEAL ON QUESTIONS OF LAW AND FACT

Messrs. Effler & Eastman and Messrs. Fraser, Effler, Shumaker & Winn for appellee.

Messrs, Brown & Sanger; Messrs. Marshall, Melhorn, Davies, Wall & Bloch; Mr. W. A. Belt; Mr. J. I. O'Connor and Mr. Sholto M. Douglas for appellant.

Carpenter. J. This is an appeal on questions of law and fact. By its second amended petition the Scott Realty Company (hereinafter referred to as the Scott Co.) asks the court to set aside as fraudulent and irregular the appraisal made in 1939 of the land owned by it at the corner of Adams and Huron Streets in Toledo on which is located the department store building of defendant, The Lasalle & Koch Company (hereinafter referred to as the Lasalle Co.) which holds a ninety-nine year lease upon that land, made in 1916. The lease provides that the rental, beginning August 1, 1939, shall be "four per cent of the fair market value of said real estate exclusive of buildings and improvements," such value to be fixed every ten years thereafter. If the parties cannot agree upon such value within six

months to ninety days before the beginning of any such ten-year period, it shall be fixed as follows:

> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, in joint session, by a majority vote, determine and fix the fair market value of said real estate, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. * * *
>
> In case said two arbitrators chosen as aforesaid be unable, or shall fail to agree upon a third arbitrator within ten (10) days after the selection of the second of them, or shall fail * * *"

the parties may choose one, but if they do not, they

> "or either of them, may apply to the said judge or court as hereinbefore provided, to select said third arbitrator, and the choice of said judge or court of said third arbitrator shall be binding upon said 'Lessor' and said 'Lessee' the same as if he had been chosen by them or by the other two arbitrators."

In 1939, the parties, being unable to agree upon a valuation, each chose an arbitrator. The Scott Co. selected George P. Crosby, a realtor who had handled its real estate matters for some years and with whom it had counselled regarding the fixing of the valuation in question. The Lasalle Co. chose Al E. Reuben, a realtor who had likewise handled its real estate business for some years and with whom it had consulted about the pending problem.

As neither Crosby nor Reuben were freeholders or

residents of the City of Toledo, the parties in writing waived those requirements of the lease, and likewise they waived any objection to them on the ground of interest, impliedly recognizing that each was interested in behalf of his client.

Crosby and Reuben were not able to agree upon a third arbitrator, so the parties joined in a written application to one of the judges of the Court of Common Pleas to make such selection. In that application they said

> "The parties have duly waived any objection to said two arbitrators on the ground of interest, freeholding or place of residence."

Thereupon the judge named as the third arbitrator, John A. Price, a Toledo lawyer who had not had any special experience in real estate matters. No objection was made to that appointment.

While the lease refers to those persons as "arbitrators," they were in fact appraisers and were so regarded in the lower court. Their sole duty was to "determine and fix the fair market value of said real estate" at that time. They were not concerned about what use would be made of the valuation they fixed. So far as they were concerned, the only controversy between the parties was as to that valuation, not unlike the fixing of a valuation of property destroyed by fire when the owner and insurer cannot agree, as in Royal Ins. Co. vs. Ries, 80 Ohio St. 272, 283. The distinction between arbitration and appraisal is also pointed out in Parks vs. Cleveland Ry. Co., 124 Ohio St. 79, 99.

Within a few days after Mr. Price's selection, he called a meeting of the appraisers who met in his office, and in a general way they discussed how they would proceed. It was agreed that Messrs. Crosby and Reuben would each prepare in his own way what they called a brief, setting forth in writing their respective views on the value of the land.

The next day Mr. Crosby delivered to Mr. Price his brief accompanied by a large volume called a "Survey" of Toledo, which contained a great deal of general information compiled by him about Toledo's industries, traffic counts on various corners in the downtown district including the Lasalle corner, the leased land, and other real estate in that vicinity in the retail district and as to each is given the "appraised value" of the land. In his brief he says of this "Survey"

> "Every bit of information contained in this survey is accurate, having been compiled with the greatest of care."

In the brief he fixes the value of this leased land at $1,612,500.00. In the "Survey," the data on that land gives "appraised value," $852,000.00. Nowhere either in brief or survey is it stated how or by whom these appraised values were determined, and the court did not find in the record where Mr. Price was told who fixed these valuations. Mr. Crosby testified at the trial that they were the "assessed" values, but the record shows that the tax valuation of the land in question was at that time $822,640.00. In both the brief and survey, several near-by parcels of land were mentioned for which tenants pay rents somewhat in proportion to that which would result from his appraisal of the Lasalle Co. land as stated in his brief.

Mr. Reuben did not file his brief for about two weeks, and when he did he attached to it a series of statistical tables and charts showing various details of business in Toledo from 1929 to 1938, and, by percentage indexes, the decline in that period. In his brief he referred to the twenties as the "boom" period and "the golden era." He also attached a letter written to him at his request by two Toledo realtors who two years before had made appraisals of downtown properties, including this, for the county auditor and gave the bases of their valuations, this one was

placed at $792,804.00, and they said in their opinion the value was no higher then than in 1937.

Mr. Reuben gave his estimate as $822,140.00.

Mr. Price testified that he studied both of the briefs and information submitted with them, and that he made some investigation on his own account, and discussed the matter with various people including some realtors, and some of his lawyer friends. He then called Crosby and Reuben to meet with him and told them he thought Mr. Crosby too high and Mr. Reuben too low, and that in his judgment $950,000.00 would be about right. After a very brief discussion, Reuben said he would agree to that value, and Crosby emphatically disagreed and left the meeting. A form of return for the appraisers to use had been prepared and approved by counsel for both parties and left with Price. He filled in the value he and Reuben had agreed upon, $950,000.00, and they both signed several copies and one was sent to each party.

The Scott Co., being dissatisfied with this appraisal, filed this action. The second amended petition contains two causes of action:

1. To set aside as fraudulent and irregular the appraisement and return made by Price and Reuben, and

2. That the court fix the "fair market value of the real estate."

On the fraud charge, it is claimed that the Lasalle Co., by its officers and Reuben, conspired to and did defraud and mislead Mr. Price into fixing an inadequate value.

The claimed irregularity is that the appraisers did not hold a formal hearing with the parties and their counsel present and submitting their evidence and arguments, and that the appraisers did not hold a deliberative session and discuss the matter orally; such, it contends is the meaning of the term "joint session," as used in the lease.

The parties in their own approach to the appraisal,

particularly in the selection of appraisers, materially departed from and modified the scheme provided for in the lease. When they agreed to the selection of their own real estate agents as their respective representatives on the board of appraisers, they robbed the appraisal of the deliberate character the lease contemplated. In so doing they, in effect, made the third man an umpire and it seems that the judge who was informed by the application to him of the interested character of the parties, appraisers, so regarded the matter when he selected a lawyer, not another realtor. Mr. Crosby evidently thought it his duty to represent the Scott Co. In the trial he was asked:

> "Mr. Crosby, do you mean to tell us that Mr. Wilcox (the president of Scott Co.) selected you as an appraiser for the Scott Realty Company without knowing what your opinion of the value was for this property? A. Well, I would say that he—I don't know why he selected me—I suppose he wanted me to represent him."

Mr. Crosby testified that when he gave Mr. Price his briefs and survey, he said:

> "I asked him,—in delivering them to him I asked him to treat them confidentially and hoped that he would do so, to which he said he would."

Mr. Price says he did so treat it. If this were to be a deliberative process, the representative appraisers should and would have exchanged copies of their briefs.

Mr. Reuben testified that he consulted with the officers of the Lasalle Co. about the value of the land, and the preparation of his brief.

Obviously, both briefs and their addenda were, and were intended to be, arguments for their respective parties and they both tried to make them as persuasive as they could.

It is urged that because Reuben took 1929, a boom year, as the basis of his percentage indexes as to various phases

of Toledo business, he committed a fraud upon and misled Mr. Price. Mr. Crosby in his brief, played up the high rentals for nearby sites on leases made in the late twenties, the same boom period. These are mentioned merely to illustrate that each representative-appraiser was only "putting his (or his client's) best foot forward." Mr. Price recognized this and was not deceived nor misled by either.

On the question of "joint session," the appraisers met twice, there is no complaint about the first one or the procedure then agreed upon. But it is urged by Scott Co. that a "joint session" meant that the parties were entitled to appear before the appraisers with counsel and present evidence and arguments, and one of its counsel testified that in a telephone conversation with Mr. Price just after his appointment, he requested such hearing. Mr. Price's version was that he merely offered to appear if the appraisers wished it, and they agreed at the first meeting that the lawyers could not help them. There was a hearing. The two interested appraisers representing their clients presented their respective evidence and arguments in their briefs and the three met and two of them fixed and determined the value. This being merely an appraisal of property of a board, not appointed by a court, but with two of the three being representatives of the parties, their proceedings met the requirements of the lease as expressly modified by the parties, and, as said in Royal Ins. Co. vs. Ries, 80 Ohio St., 272, their refusal to hear evidence and arguments tendered by the parties, assuming as true the Scott Co.'s claim it did tender them, "is not ground for setting aside the appraisement."

As is quite usual in such a disputed valuation of property, expert witnesses for Scott Co., nine of them, placed the value much higher than the appraisal returned; those for Lasalle Co., seven of them, were all lower. This court

can not say that the value as fixed was so inadequate as to indicate either fraud or irregularity.

Finding no fraud or irregularity to warrant setting aside the appraisal, it is "binding and conclusive as to the parties." Having arrived at this conclusion, consideration of the second cause of action is unnecessary.

The second amended petition is dismissed at the cost of the plaintiff.

Overmyer and Lloyd, JJ., concur.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

No.....

THE SCOTT REALTY COMPANY,

Petitioner,

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONCISE STATEMENT OF CASE

This case arose out of an appraisal of the fair value of land made by three appraisers under the terms of a ninety-nine year lease which provided for a decenial appraisal of the value of the land and the payment in each ten-year period of a rental of 4% of the amount so found to be the value.

The lessor appointed its real estate agent as its appraiser, the defendant appointed its agent and the third was appointed by a judge of the Common Pleas Court on the joint petition of the parties.

The appraisers agreed upon the procedure and method of ascertaining value. The agent-appraisers each prepared

and filed with the third appraiser lengthy written statements of facts and conclusions as to value which were considered by the court-appointed appraiser along with facts developed by his own inquiries.

The three appraisers met to consider the matter. The court-appointed appraiser stated his view as to value, the lessee's agent-appraiser agreed, and the lessor's agent-appraiser refused to agree, whereupon the majority delivered to the parties their decision or award as to valuation.

The lessor then brought a suit in equity in the Common Pleas Court to vacate and set aside the award as fraudulent,* and not in conformity with the terms of the lease. In a second cause of action, the lessor asked the Common Pleas Court to determine the fair value of the land for the purposes of the lease in the event it determined to vacate the award.

After a trial which lasted eight weeks the Common Pleas Court without written or oral opinion or findings vacated the award and determined the valuation.

The lessee then took the case to the Court of Appeals on appeal on law and fact, which, under the law of Ohio, entitled the parties to a trial *de novo*. (General Code of Ohio, Sec. 12223-21.) The case was so tried in the Court of Appeals. By stipulation the facts were presented by the complete record or transcript of testimony taken in the lower court and some additional facts established by depositions.

The Court of Appeals dismissed the lessor's petition and upheld the appraisal award. For the findings and conclusions of the Court of Appeals see Vol. I, page 108,

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* The petition and amended petition, Vol. I, page 1 *et seq.*, of the record, so-called, filed herein, will show the range, variety and epithetic character of the charges of fraud.

Note also from the partial record on file here and more particularly from the complete record, that the facts as stated in petitioner's brief are inaccurate, misleading and incomplete.

of partial record. The opinion of the Court of Appeals appears at the end of the petitioner's brief.

Attention is here called to the fact that the complete record of the case in the Court of Appeals is not now before this court, but only that part which petitioner-lessor elected to print. Volumes I and II are entitled "Transcript of Pertinent Parts of the Record." Though the Supreme Court of Ohio had the complete record before it counsel for lessor used Volumes I and II in argument. (R., Vol. III, p. 935.) They were filed with and were in reality a part of lessor's brief in that court. Volume III is entitled "Proceedings in the Supreme Court of the State of Ohio."

At no time has the respondent been given the opportunity to consider or determine the parts of the record that should be printed or filed in this case, as we believe is intended by the rules of practice in this court. This is a case that turned upon all the facts. It is now brought into this court on a partial and deficient record.

When the Court of Appeals decided the case in favor of the lessee on all the issues of law and fact and entered its judgment, the lessor took it to the Supreme Court on (1) a motion to certify, equivalent to *certiorari,* and (2) upon appeal.

In Ohio the Supreme Court may review any judgment of a Court of Appeals on a motion to certify if it finds the case to be one of great or general public interest. As we say, this is substantially the same as a *certiorari* proceeding in this court. The Supreme Court of Ohio if it involves a constitutional question may review a case on appeal.

Article IV, Section 2, of the Ohio Constitution prescribes the jurisdiction of the Supreme Court in these words:

> "It (the Supreme Court of Ohio) shall have * * * appellate jurisdiction in all cases involving questions arising under the constitution of the United States

> or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. * * *"

With its motion to certify and its appeal, the lessor filed in the Supreme Court of Ohio the typewritten transcript of all pleadings and orders theretofore entered in the case and all the testimony taken in the Court of Appeals.

It then printed for its own convenience and as a part of its brief in the Supreme Court of Ohio the parts, but only the parts, of the record it wanted to use in argument under the title "Transcript of Pertinent Parts of Record." That, as we have stated, is what is now before this court.

In the Supreme Court of Ohio the lessor raised what it called a constitutional question by asserting it had been denied due process of law in that the appraisers had not granted or allowed to it a "hearing" at which lessor could appear by counsel, offer testimony and present arguments, as would or might be done in a formal trial before a court.

In all the three years the case had been pending in the Common Pleas Court and Court of Appeals, the lessor had not in pleadings or in any other way made complaint of a violation of the so-called constitutional right. That came for the first time in the Supreme Court of Ohio.

The Supreme Court of Ohio denied the motion to certify presumably because it found in the case no question of great or general public interest and it dismissed the appeal on the motion of the lessee on the ground that no debatable constitutional question was presented. (Record, Vol. III, p. 937.)

In its second amended petition in the Common Pleas Court the lessor had complained that it had been denied a "hearing," but it did not in such petition or at any time

before the case got into the Supreme Court of Ohio complain of a violation of constitutional rights.

Manifestly, the constitutional claims of the appellant cannot be heard now. This has long been the rule of this court and the Supreme Court of Ohio. The Court of Appeals cannot be said to have erred as to a matter to which its attention was never directed and which it had no opportunity to consider. It did not consider, and was not asked to consider, any constitutional question.

In any view the Court of Appeals of Ohio found as a fact that the lessor had a hearing. (Special Finding 17, Record, Vol. I, p. 117.)

Attention is called to the following findings of the Court of Appeals. The court found "upon all issues of fact tendered by the first cause of action of the second amended petition of The Scott Realty Company * * * against The Scott Realty Company and in favor of The Lasalle & Koch Company." (Special Findings Nos. 15 and 16, R., Vol. I, p. 117.)

The court further found that "the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations or irregularities." (Special Finding No. 15, R., Vol. I, p. 116.)

The court further found "that the parties did have a hearing"; that the appraisers did meet "in joint session" and that "the amount of the appraisal ($950,000 land alone) does not indicate either fraud or irregularity." (Special Finding No. 12, R., Vol. I, p. 116.)

Having found that the appraisal was "binding, final and conclusive as to and upon the parties, the Court of Appeals found it unnecessary to consider the second cause of action contained in the second amended petition of The Scott Realty Company." (Special Finding No. 17, R., Vol. I, p. 117.)

Though what we have said should suffice to dispose of

this petition for *certiorari,* we call attention to the following:

1. This was an appraisal proceeding and not an arbitration.

While the lease refers to the valuation proceeding as an arbitration, it was in fact an appraisal. It was so regarded by the three courts that have heard the matter thus far. It has always been so regarded by lessor until the proceedings in this court.

The fact is that counsel for The Scott Realty Company so stipulated in a brief filed with the Court of Common Pleas of Lucas County, Ohio, on September 2, 1939, wherein it was stated on page 7:

> "We readily agree * * * that the so-called arbitration is in reality a mere appraisal of value. * * * Let it be understood therefore for all purposes in this case that where the lease and the petition used the words 'arbitration,' 'arbitrator' or 'arbitrators,' that these words are used in the sense of 'appraisal,' 'appraiser' or 'appraisers'."

2. In an appraisal proceeding the parties are not entitled to a hearing or trial as in a court or as in an arbitration proceeding.

That is the law of Ohio as decided by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries,* 80 O. S. 272 (1909), 88 N. E. 638, and by the Supreme Court of Ohio and the Court of Appeals of Lucas County, Ohio, in this case.*

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* It is universally held throughout the decisions that appraisers unlike arbitrators need give no notice of their meetings, need not conduct hearings or give the parties an opportunity to present evidence. *Monidah Trust Co. vs. Arctic Construction Co.,* 264 Fed. 303, 9 C. C. A. (1920); *Royal Ins. Co. vs. Ries,* 80 O. S. 272, 88 N. E. 638 (1909); 36 C. Jur. 191, 851; *Fleming vs. Phoenix Assurance Co. of London,* 75 Hun. 530; *Pearson vs. Sanderson,* 128 Ill. 88, 21 N. E. 200 (1889); *Norton vs. Gale,* 95 Ill. 533, 35 Am. (1903); *Wurster vs. Armfield,* 175 N. Y. 256, 67 N. E. 584 (1903); *Zallee vs. Laclede Mutual Fire & Marine Ins.,* 44 Mo. 530 (1869); *Sebree vs. Board of Education,* 254 Ill. 438, 98 N. E. 931 (1912).

In that petitioner has cited *Brown vs. Lyddy,* 11 Hon. 451, we call particular attention to the case of *Wurster vs. Armfield, supra,* which states the present New York rule.

3. The lessor, pivoting its claim on the case of *Worthington vs. Hewes & McCann,* 19 O. S. 66 (1869), asserts that under the law of Ohio, notwithstanding the later case of *Royal Insurance Co. vs. Ries, supra,* and the decisions in the case at bar, parties to an appraisal proceeding are entitled as a matter of constitutional right to a hearing or trial before the appraisers.

4. So it is, that this petition for *certiorari* asks this court to decide

a. That the Court of Appeals erred in its findings of fact and law that the lessor had had a "hearing"; that the appraisers met in "joint session" as required by the lease; and that "the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations and other irregularities."

b. That the law of Ohio as to the procedure of appraisers is not as declared (a) by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries, supra,* (b) by Court of Appeals, and (c) by the Supreme Court in this case, but on the contrary is as stated in the opinion of the case of *Worthington vs. Hewes & McCann, supra.*

c. That, if the *Worthington* case and not *Royal Insurance Co. vs. Ries, supra,* is held by this court to state the law of Ohio so as to require appraisers to give the parties a hearing, such right of hearing is a constitutional right which continues to be enforceable notwithstanding a judicial finding that in fact a hearing was had.

d. That the lessor may in this court by petition for *certiorari* assert a constitutional right, which it did not assert at any stage of the litigation until it got into the Supreme Court of Ohio.

e. That the facts as to the observance or non-observance of an asserted constitutional right, the violation or non-violation of such asserted right and a variety of Ohio procedural questions may be determined on this petition for *certiorari* on a partial record or transcript.

It is respectfully submitted that unless all such questions are answered in favor of petitioner, and none in

favor of the respondent, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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